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IN THE UNITED STATES
CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

POLSON LOGGING COMPANY, a corporation,
Plaintiff in Error,

vs.

GUSTAVE H. NEUMEYER and ABRAHAM J. DIMOND, co-partners doing business under the name and style of NEUMEYER & DIMOND,
Defendants in Error.

No. 2584.

UPON REVIEW FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

SUPPLEMENTAL AUTHORITIES BY DEFENDANT IN ERROR.

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Defendant in error having had no opportunity to answer the reply brief at the oral argument owing to the neglect of plaintiff in error in filing its opening brief, on April 30, 1915, less than two

weeks of the oral argument, we respectfully pray the court to consider this short supplemental citation of authorities.

We do not controvert the soundness of *Rhoehm vs. Horst,* 178 U. S. 1, or *Frost vs. Knight,* L. R. 7 Exch. 111, but these cases refer to anticipatory breaches of executory contracts and throw no light upon the law of executed contracts. The contract has undoubtedly been kept alive by Neumeyer & Diamond, but the condition precedent has been waived. This distinction between executory and executed contracts is made perfectly clear by Judge Hand in *Lorraine Mfg. Company vs. Oshinsky, et al.,* 182 Fed. 407 (1910).

The court said:

"The second point is as to waiver, and it is based upon the general proposition that the defendant cannot, by his waiver of a condition precedent, subject himself to liability which he did not originally accept. Thus, if here the obligation was to pay for 231, that was the only undertaking, and to hold the defendants liable for the delivery of 222 pieces is to impose upon them a liability to which they have never agreed. *The objection is formally perfect, and substantially idle.* In the first place, there was held only an implied condition, and nothing is more common than to hold liable promissors, who have waived conditions precedent, *without proof of performance by the promisee.* The rule

is of general application (*Littlejohn vs. Shaw,* 159 N. Y. 188; 53 N. E. 810; *Oakland Sugar Mill Co. vs. Wolf Co.,* 118 Fed. 239; 55 C. C. A. 93), and upon it depends the right of the seller to sue for the price after acceptance without proof that the goods were free from defect.

"The same rule applies to a shortage in delivery. *Pittsburgh Plate Glass Co. vs. Kerlin Bros. Co.,* 122 Fed. 414; 58 C. C. A. 648; *Braley vs. Cassity,* 145 N. Y. 171; 39 N. E. 814. The defendants had *ample opportunity* to know the shortage. They had the goods and the invoice. They made no objection on that score and they waived the rights, and it makes not a particle of difference that their choice of that particular time to do so might be through selfish or repulsive to the more generous instincts of merchants; but they were nevertheless subject to the rules of just conduct which the law applies to such situations, and I cannot see that even this afterthought of their ingenious counsel avails them under the facts of the case."

That repudiation of the contract is a waiver of conditions precedent is sustained by three cases in point:

Braithewatie vs. Foreign Hardware Company, 2 K. B. 543;

Zeimantz vs. Blake, 39 Wash. 6; 80 Pac. 822.

Linger vs. Wilson, 80 S. E. 1108 (West Va. 1914).

An exactly similar situation came before the Supreme Court of Appeals of West Virginia in 1914, in *Linger, et al., vs. Wilson,* 80 S. E. 1108.

The court:

"And it is quite apparent in the case that the matter of quantity was a remote and secondary condition by defendant. He deliberately stated a single objection to receiving the shipment. That single objection was the alleged failure of plaintiffs to comply with a former contract. He expressed a willingness, however, to take the full shipment if his claim made under the alleged former contract was considered in settlement. Thus he inferentially waived objection to the excess of quantity. 'A rejection placed upon one ground may operate as a waiver of objection based upon other grounds.' 24 Amer. & Eng. Enc. Law, 1092; Benjamin on Sales (7th Amer. Ed.), page 738. The character of defendant's objection, and the condition embraced therein, so operated in this case. 'When the refusal to accept purchased goods is based upon particular objections, formally and deliberately stated, all other objections are deemed waived.' *Littlejohn vs. Shaw,* 159 N. Y. 188; 53 N. E. 810. An excerpt from the opinion in the case cited is applicable to the case under consideration: 'This waiver of all other objections is not only justly inferable, generally; but is especially so, when, as under the circumstances presented in this case, the deliberateness with which the objections are stated leaves it to be implied that there has been a consideration of the matter of the acceptance of the goods and a result reached upon particular grounds.'

"Moreover, defendant persisted in a baseless objection until a reasonable time had expired for objecting on the ground of an excess of quantity. Though a purchaser of goods does not order the quantity delivered to him, a sale of the whole will be implied where on receiving the goods the purchaser does not within a reasonable time repeal the implication by returning the goods or notifying the seller that he will not accept the goods or notifying the seller that he will not accept them because of the excess of quantity. Failure to return, or to give notice of nonacceptance, amounts to an acceptance. *Bartholomae vs. Paull,* 18 W. Va. 771; *Thompson vs. Douglass,* 35 W. Va. 337; 13 S. E. 1015; *Ford vs. Friedman,* 40 W. Va., 177; 20 S. E. 930. In reason, and in justice to plaintiffs' rights, defendant could not delay so long as he did and then rely on an objection to the quantity. *He impliedly accepted the full quantity, subject only to the baseless objection to which we have referred.* Indeed, his letters of objection to plaintiffs plainly show that he had no objection to the quantity if he could have the alleged breach of a former contract taken into consideration in settlement."

The rule is universal throughout the United States that every buyer has the right to inspect or the opportunity to inspect merchandise upon delivery. Equally universal is the rule that the buyer must make his inspection within a reasonable time else he shall be conclusively presumed to have ac-

cepted. By logic every right imposes a correlative duty. By law the right given the buyer to inspect imposes the duty upon the buyer to the seller that he inspect and either accept or refuse.

Benjamin on Sales, 666 (Bennett Ed.; 1888).

Mechem on Sales, Secs. 1363, *et seq.*

9 *Cyc.,* 647.

Buick Motor Car Co. vs. Reid Mfg. Co., 113 N. W. 591 (Mich.).

Western Construction Co. vs. Romona Oolitic, 80 N. E. 856 (Ind.).

Motley Green & Co. vs. Elmerhorst, 127 N. Y. Sup. 625.

Eaton vs. Blackburn, et al., 5 Oregon, 300; 16 Am. & Eng. Ann. Cases 1198.

Day Leather Company vs. American Leather Co., 104 N. W. 797.

Mason vs. Smith, 130 N. Y. 480; 29 N. E. 949.

Grenfelder vs. Vosburgh, 85 N. Y. Sup. 1048.

Druckleib vs. Universal Tobacco Co., 94 N. Y. Sup. 777.

Failure to inspect is approval.

Fraser vs. Ross, 41 Atl. 204 (Delaware, 1898).

Plaintiff was mislead:

1. Assumed the shipment was objected to because of forgery, fraud and want of authority only.

2. Assumed the quantities were correct and satisfactory because no objection was made. Had the right to assume as much under the authorities.

3. Deprived of the opportunity to show that the kind of steel ordered is by nature inexact and runs in "approximate" lengths and was so understood by the parties.

4. Deprived of the opportunity to show conclusively and absolutely the delivery, receipt and consumption by Polson of twelve bars of steel and hence *Polson's absolute liability under Meyer vs. Everett Pulp & Paper Co.,* 183 Fed. 857 (C. C. A. 9th).

Do we understand counsel for Polson to contend that a buyer may by baseless and false objections refuse a shipment actually delivered as provided in the contract for two years, then upon the trial saying nothing in his opening statement, nor breathing the defense from his own lips, or from the lips of witnesses upon the stand, only announcing his contention in his argument to the jury that the bars were of excessive length and not in compliance with the contract, still contend that such conduct and course of dealing bears any of the earmarks of fair dealing or of justice? That his silent acqui-

escence has deceived and misled no one? That the notice of defects given and the opinion of Judge Lurton in *Oakland Sugar Mill Co. vs. Fred W. Wolfe Co., supra,* and the pleadings in *Patrick vs. Norfolk Lumber Co., supra,* were irrelevant and immaterial?

SUBSTANTIAL COMPLIANCE.

Steel (20 ft. lengths)	28,804 pounds
Steel Shipped	30,910 pounds
Over Shipment	2,106 pounds

Or 7.3%.

Respectfully submitted,

JOHN W. ROBERTS,

NELSON R. ANDERSON.